

ROBERT S. BOULTER (SB NO. 153549)
rsb@lb-attorneys.com
PETER C. LAGARIAS (SB NO 77091)
pcl@lb-attorney.com
LAGARIAS & BOULTER, LLP
1629 Fifth Avenue
San Rafael, California 94901-1828
Telephone: (415) 460-0100
Facsimile: (415) 460-1099

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JOHNSON DESIGN ASSOCIATES, INC., a)
California corporation and SHARYN)
JOHNSON, an individual)

Plaintiff,)

vs.)
DUX INTERIORS, INC., a New York)
corporation, BO GUSTAFSSON, an individual)

Defendants.)

Case No. 3:07-CV-05754-MMC

PLAINTIFFS' OPPOSITION TO MOTION
TO DISMISS

Date: January 18, 2008

Time: 9:00 a.m.

Place: 450 Golden Gate Avenue
San Francisco, CA

Courtroom 7

Judge: Hon. Maxine M. Chesney

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF ISSUES TO BE DECIDED	2
III.	STATEMENT OF FACTS	2
IV.	ARGUMENT	3
A.	Dismissal Is Not Appropriate Under The Federal Pleading Rules	3
B.	The Plaintiffs Have Stated a Claim for Breach of the Contract.....	5
1.	The Plaintiffs Have Stated a Claim for Wrongful Termination.....	5
2.	The Plaintiffs Have Stated Claims for Other Breaches of Contract and the Implied Covenant of Good Faith.....	7
a.	Providing substandard and sub-legal goods.....	7
b.	Failing to honor warranty and other reimbursement requirements.....	7
c.	Failing to properly advertise the brand and services and requiring Plaintiffs to waste money on ineffectual advertising.....	7
d.	Failing to provide Plaintiffs like prices, discounts, and incentives offered to others similarly situated	7
e.	Diverting plaintiffs customer orders to themselves and other more favored franchisees	7
f.	Raising prices without the required thirty-day notice;.....	8
g.	Interfering with relations Plaintiffs' employees.....	8

1	C.	The Plaintiffs Have Stated a Claim for Unfair Competition.....	8
2	D.	The Plaintiffs Have Stated a Claim for Injunctive Relief.	9
3	E.	Sharyn Johnson Has Stated a Claim for Intentional Infliction of Emotional	
4		Distress.....	10
5	F.	Plaintiffs’ Have Stated a Section 17200 Claim.....	12
6	G.	The Plaintiffs Concede Their Claim for Conversion.	13
7	H.	The Plaintiffs Concede Their Claim for Unjust Enrichment.	13
8	I.	Even If Found To Be Deficient, Any Dismissal Should Be With Leave To	
9		Amend:.....	13
10	V.	CONCLUSION	14
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			

TABLE OF AUTHORITIES

CASES

<i>ABC International Traders, Inc. v. Matsushita Electric Corp.</i> , 14 Cal.4th 1247, 61 Cal.Rptr.2d 112 (1997)	8
<i>Alcorn v. Anbro Engineering, Inc.</i> , 2 Cal.3d 493 (1970)	11
<i>Allied Grape Growers v. Bronco Wine Co.</i> , 203 CA3d 432, 249 CR 872, 883 (1988)	12
<i>Bennett v. Schmidt</i> , 153 F3d 516 (7th Cir. 1998)	4
<i>Big Bear Lodging Ass'n v. Snow Summit, Inc.</i> , 182 F.3d 1096 (9th Cir. 1999)	14
<i>Breuer v. Rockwell Int'l Corp.</i> , 40 F. 3d 1119 (10th Cir. 1994)	4
<i>Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.</i> , 20 Cal.4th 163, 83 Cal.Rptr.2d 548 (1999)	13
<i>Davis v. Schere</i> , 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984)	4
<i>Fletcher v. Western National Life Ins. Co.</i> , 10 Cal.App.3d 376 (1970)	11
<i>Gilligan v. Jamco Develop. Corp.</i> , 108 F3d 246 (9th Cir. 1997)	4
<i>Glenn K. Jackson Inc. v. Roe</i> 273 F.3d 1192 (9th Cir. 2001)	12
<i>Independent Ass'n of Mailbox Center Owners, Inc. v. Superior Court</i> 133 Cal.App.4th 396, 410, 34 Cal.Rptr.3d 659, 670 (2005)	12
<i>Lucas v. Dep't of Corr.</i> , 66 F.3d 245 (9th Cir. 1995)	4
<i>Orkin Exterminating Co., Inc. v. FTC</i> 849 F2d 1354 (11th Cir. 1988)	12, 13
<i>Polich v. Burlington N., Inc.</i> , 942 F.2d 1467 (9th Cir. 1991)	14
<i>Scheuer v. Rhodes</i> , 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)	4
<i>Self Directed Placement Corp. v. Control Data Corp.</i> 908 F2d 462 (9th Cir. 1990)	9
<i>Stanley v. University of So. Calif.</i> 13 F3d 1313 (9th Cir. 1994)	10
<i>Superior Motels, Inc. v. Rinn Motor Hotels, Inc.</i> 195 Cal.App.3d 1032 (1987)	6
<i>Swierkiewicz v. Sorema N.A.</i> , 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)	9
<i>Tercica, Inc. v. Insmid Inc.</i> , 2006 U.S. Dist. LEXIS 41804 (N.D. Cal. 2006)	14
<i>Tom Doherty Associates, Inc. v. Saban Entertainment, Inc.</i> 60 F.3d 27 (2 nd Cir. 1995)	10
<i>United States v. Redwood City</i> , 640 F2d 963 (9th Cir. 1981)	4

1	<i>Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.</i> , 546 U.S. 164, 126 S.Ct. 860, 870, 163 L.Ed.2d 663 (2006)	9
2		
3	<i>Wallis v. Superior Court</i> , 160 Cal App 3d 1109, 207 Cal Rptr 123 (1984).....	11
4	<i>Weinberger v. Romero-Barcelo</i> 456 US 305, 102 S.Ct. 1798 (1982)	10

5 **STATUTES**

6	Fed. R. Civ. P. 12	3, 4
7	Fed. R. Civ. P. 15	5
8	Fed. R. Civ. P. 8	4

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PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

I. INTRODUCTION

Defendants' motion to dismiss should be denied because the complaint¹ sets forth a short and plain statement of the facts entitling the plaintiffs to relief. Since 1991, Plaintiff Johnson Design Associates, Inc. ("JDA") has been the exclusive licensed distributor/franchisee of the Dux Interiors, Inc. ("Dux") line of beds and related products for Marin and Sonoma Counties. Plaintiff Sharyn Johnson (Johnson) is the owner of JDA. Johnson, 62 years old, relies on the business to provide her income. The contract grants JDA 1) "evergreen" renewals and 2) permits termination only for cause after a notice and cure period.

After this sixteen- year history during which JDA purchased and sold millions of dollars of Dux merchandise, Dux served JDA with a termination notice on October 12, 2007 alleging that JDA's failure to utilize the tiny registered trademark "®" symbol in connection with a single customer postcard mailing constituted an "incurable" breach justifying termination of the entire agreement. Instead of using the ® mark in connection with the mailing, Plaintiff used the "tm" designation. The error was due to a mistake by the store manager and using a new vendor for printing. Case law is clear that termination is not an available remedy under these circumstances.

Plaintiffs' allege that the termination is wrongful and a pretext by Dux and Defendant Gustafsson (Dux's president) to convert Plaintiffs' valuable business to the benefit Dux and Gustafsson, and their associates. Indeed, the termination follows through on previous threats and intimidation by Gustafson and Dux to Plaintiffs that they should sell their business to Dux's associates (including one Dan Udoutch, a San Francisco resident) "while they still have something to sell." Sharyn Johnson also alleges this conduct was outrageous and intended to cause her such emotional distress that she would capitulate to Defendants' unlawful demands and termination.

Plaintiffs also allege Dux failed to properly warranty and manufacture products causing

¹ Plaintiffs filed a signed complaint with this court and have a copy of it. If a defect in the signature does in fact exist, it will be cured. It is possible and electronic version of the complaint sent out for service was not printed with the signature. Defendants have responded to the complaint and have suffered not any prejudice.

1 damages. And Dux extended discounts and incentives to other dealers not disclosed and made
 2 available to Plaintiffs. These facts give rise to claims under breach of contract and unfair
 3 competition theories. In sum, the complaint states facts and claims for relief and Defendants
 4 motion should to dismiss should be denied.

5 6 **II. STATEMENT OF ISSUES TO BE DECIDED**

7 Whether Plaintiffs have alleged claims entitling them to relief and, if not, whether
 8 Plaintiffs must provide a more definite statement or otherwise amend their pleadings.

9 10 **III. STATEMENT OF FACTS**

11 Plaintiff Johnson Design Associates, Inc. is a licensed distributor/franchisee of the Dux
 12 Interiors, Inc. (“Dux”) line of beds and ancillary items under contract entered into in 1991.
 13 Complaint ¶ 14. Plaintiff Sharyn Johnson is the owner of Johnson Design. Complaint ¶ 13. JDA
 14 has served Dux as a distributor/franchisee continuously since 1991 pursuant to a contract which
 15 grants it 1) “evergreen” renewals (Gustafsson Dec. Ex. A, § 15.1 p. 29 of 48) “...the Agreement
 16 shall not expire, and shall continue in effect at the end of the Initial Term and each of the
 17 Renewal Terms...” and 2) permits termination only for cause after a notice and cure period (Id. §
 18 15.2, p. 19 of 48) “either party may terminate this Agreement....a) if the other party shall be in
 19 default...and shall have failed to correct or cure such default within thirty Calendar days....”).
 20 See also Complaint ¶ 14.

21 After this sixteen- year history during which JDA purchased and sold millions of dollars
 22 of Dux merchandise, Dux served JDA with a termination notice on October 12, 2007 alleging that
 23 its failure to utilize the tiny registered trademark ® symbol in connection with a single customer
 24 mailing constituted an “incurable” breach. Complaint ¶ 14; Gustafsson Dec. Ex. 2, p. 55. Instead
 25 of using the ® mark in connection with the mailing, Plaintiff used the “tm” designation.
 26 Complaint ¶ 14. The error was due to a mistake. Complaint ¶ 14.

27 The termination is alleged to be wrongful and a pretext by Dux and Defendant Gustafsson
 28 (Dux’s president) to convert Plaintiffs’ valuable business to the benefit Dux and Gustafsson, and

1 their associates. Complaint ¶ 15. Indeed, Dux, Gustafsson, and other associates to be identified
 2 have engaged in a similar pattern across the country in recent years of terminating Dux
 3 distributor/franchisees and converting their business for their own accounts. Complaint ¶ 16. And
 4 in 2006 and 2007, Gustafson and Dux repeatedly threatened and intimidated Plaintiffs that they
 5 should sell their business Dux's associates (including one Dan Udoutch, a San Francisco resident)
 6 "while they still have something to sell." Complaint ¶¶ 15-17.

7 With respect to injunctive relief, Plaintiffs complain that breaches complained of were
 8 immaterial, that the termination was wrongful, and that if the termination is permitted to stand,
 9 Plaintiffs will suffer irreparable harm including the loss of livelihood and a substantial
 10 investment. Complaint ¶¶ 24-26. Regarding breach of contract, JDA complains that Dux
 11 breached the agreement and the implied covenant of good faith by wrongful termination and other
 12 actions. Complaint ¶¶ 33, 35. Regarding unfair competition, the complaint alleges that Dux
 13 failed to provide Plaintiffs the same prices, discounts, and incentives it provides to other dealers
 14 like Plaintiffs. Complaint ¶ 34. Regarding conversion, Plaintiffs allege that the termination of
 15 the agreement under these facts amounts to conversion of her property. Complaint ¶ 38.
 16 Regarding infliction of emotional distress, Ms Johnson alleges that the termination of the
 17 agreement (i.e wrongful under these facts) and the conduct of defendants leading up to the
 18 termination was designed to inflict emotional distress and force capitulation. Complaint ¶¶ 42-
 19 43. Plaintiffs claim that if the termination is permitted, Defendants will have been unjustly
 20 enriched by the wrongful appropriation of Plaintiffs' business. Complaint ¶ 46. Finally,
 21 Plaintiffs claim that the scheme to terminate her franchise and convert to the benefit of Dux, Mr.
 22 Gustafsson, and their associates constitutes statutory unfair competition. Complaint ¶ 50.

24 **IV. ARGUMENT**

25 **A. Dismissal Is Not Appropriate Under The Federal Pleading Rules**

26 Federal courts view Federal Rule of Civil Procedure 12 (b) (6) motions with disfavor
 27 because of the lesser role pleadings play in federal practice and the liberal policy regarding
 28 amendment. "The motion to dismiss for failure to state a claim is viewed with disfavor and is

1 rarely granted.” *Gilligan v. Jamco Develop. Corp.*, 108 F3d 246, 249 (9th Cir. 1997) (emphasis
 2 added; internal quotes omitted); *United States v. Redwood City*, 640 F2d 963, 966 (9th Cir. 1981)
 3 [12(b)(6) dismissal is proper only in “extraordinary” cases.].

4 Instead of lavishing attention on the complaint until the plaintiff
 5 gets it just right, a district court should keep the case moving—if
 6 the claim is unclear, by requiring a more definite statement under
 7 Rule 12 (e), and if the claim is clear but implausible, by inviting a
 8 motion for summary judgment.

9 *Bennett v. Schmidt*, 153 F3d 516, 518 (7th Cir. 1998).

10 The Federal Rules of Civil Procedure require that a pleading asserting a
 11 claim for relief ... contain ... (1) a *short and plain* statement of the
 12 grounds upon which the court's jurisdiction depends ... (2) a *short*
 13 *and plain* statement of the claim showing the pleader is entitled to
 14 relief, and (3) a demand for judgment for the relief the pleader
 15 seeks.

16 Fed. R. Civ. P. 8 (a) (emphasis added).

17 Rule 8 concludes with the admonition: “[a]ll pleadings shall be construed as to do
 18 substantial justice.” Fed. R. Civ. P. 8 (f). “The issue is not whether a plaintiff will ultimately
 19 prevail but whether the claimant is entitled to offer evidence to support the claims.” *Scheuer v.*
 20 *Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), overruled on other grounds by
 21 *Davis v. Schere*, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984). Finally, the burden of
 22 proof in connection with a motion brought pursuant to Federal Rule of Civil Procedure 12(b)(6)
 23 lies with the moving party. *Breuer v. Rockwell Int'l Corp.*, 40 F. 3d 1119, 1125 (10th Cir. 1994).
 24 And in the event that a motion to dismiss for failure to state a claim has merit, the court will
 25 generally permit the pleader to amend unless an amendment would be futile. *Lucas v. Dep't of*
 26 *Corr.*, 66 F.3d 245, 248 (9th Cir. 1995). If the court grants a motion to dismiss a complaint, it
 27 must then decide whether to grant leave to amend. The Court should “freely give[]” leave to
 28 amend when there is no “undue delay, bad faith[,] dilatory motive on the part of the movant, . . .

undue prejudice to the opposing party by virtue of... the amendment, [or] futurity of the amendment. . . .” Fed. R. Civ. P. 15 (a).

B. The Plaintiffs Have Stated a Claim for Breach of the Contract

1. The Plaintiffs Have Stated a Claim for Wrongful Termination.

Dux’s primary argument goes to the merits of this case and is not properly decided in this motion to dismiss. Dux complains that the termination was proper on the merits because the breach was “incurable” and ergo that Plaintiffs cannot state a claim. Dux is wrong.

The contract neither defines the term incurable breach nor does it provide termination in such cases. Section 15.2 of the contract provides in pertinent part that:

Without prejudice to any remedy either party may have for breach or nonperformance of this Agreement, either party may terminate this Agreement at any time during the Initial Term of this Agreement or any Renewal Period, upon the occurrence of any of the following events:

If the other party shall be in default of any of its obligations hereunder and shall have failed; to correct or cure such default within thirty (30) calendar days after having received written notice of such default;

provided however, that if the Company is the terminating party, it shall have given you at least 60 days written notice of the reasons for termination of the agreement as described above.

As noted, the plain language of the contract does not provide for any category of “incurable” default for termination. Termination is reserved for only the most drastic breaches that are not cured after proper notice. The contract is in accord with California law that termination is a most drastic remedy and not available for breaches of the kind at issue here. Simply put, California law does not permit termination of the contract where Plaintiffs used a “tm” instead of a ® symbol on a single customer mailing. At worst, Plaintiffs committed a nonmaterial breach of the agreement justifying damages, if any. Termination was entirely disproportionate to the offense and can only be properly explained in light of the ulterior motives and malice Plaintiffs have alleged.

1
2 The law sensibly recognizes that although every instance of
3 noncompliance with a contract's terms constitutes a breach, not
4 every breach justifies treating the contract as terminated. [Citations]
5 Following the lead of the Restatements of Contracts, California
6 courts allow termination only if the breach can be classified as
7 "material," "substantial," or "total." [Citations]

8 Cardozo had occasion to examine the distinction between material
9 and inconsequential breaches in his landmark decision regarding
10 substantial performance of a construction contract. "The courts
11 never say that one who makes a contract fills the measure of his
12 duty by less than full performance. They do say, however, that an
13 omission, both trivial and innocent, will sometimes be atoned for by
14 allowance of the resulting damage, and will not always be the
15 breach of a condition to be followed by a forfeiture." (*Jacobs &*
16 *Youngs v. Kent* (1921) 230 N.Y. 239, 241, 129 N.E. 889.) ...
17 Nowhere will change be tolerated, however, if it is so dominant or
18 pervasive as in any real or substantial measure to frustrate the
19 purpose of the contract.... The question is one of degree, to be
20 answered, if there is doubt, by the triers of the facts.... We must
21 weigh the purposes to be served, the desire to be gratified, the
22 excuse for deviation from the letter, the cruelty of enforced
23 adherence.... [T]he law will be slow to impute the purpose, in the
24 silence of the parties, where the significance of the default is
25 grievously out of proportion to the oppression of the forfeiture." (*Id.* at pp. 243-244, 129 N.E. 889.)

19 *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* 195 Cal.App.3d 1032, 1051 (1987).

20 The mailing of the postcard without the ® was an *innocent mistake*. A copy of the
21 postcard is attached to hereto as Exhibit A. No ordinary person receiving this postcard would
22 know or care whether the term ® or "tm" was used. Moreover, while Plaintiffs could send a
23 corrective notice, it would be a wasteful exercise. However, if required to preserve her
24 dealership, Plaintiff will do so. Plaintiffs did not do so and did not offer to do so because
25 Defendants have always asserted the breach was incurable. Finally, Plaintiffs note that Dux and
26 Mr. Gustafsson have also mailed marketing materials without the ® making their lengthy
27 arguments about protection of the trademark hypocritical. See Exhibit B hereto. In sum,
28

1 Plaintiffs have properly pled a claim for wrongful termination of the agreement.

2
3 **2. The Plaintiffs Have Stated Claims for Other Breaches of Contract and the**
4 **Implied Covenant of Good Faith.**

5 Plaintiffs have other miscellaneous claims for breach of contract in paragraph 33. These
6 claims are sufficiently identified for Defendants to know what they are referring to and to conduct
7 discovery on the matters.

8 **a. Providing substandard and sub-legal goods**

9 This claim refers to Dux providing flammable bedding materials that were the subject of a
10 recall. Dux knows well the nature of this claim.

11 **b. Failing to honor warranty and other reimbursement requirements**

12 This claim refers to Dux failing to provide reimbursement to plaintiffs who made good on
13 warranty claims to customers. Section 10.2 of contract states Dux will reimburse JDA for any
14 expenses dealing with warranty claims. Dux has not honored this part of the agreement and has
15 not reimbursed JDA for expenses submitted in the past. Also, JDA has been required to order
16 warranty replacements and warehouse them at a cost of \$125 per month when Dux should be
17 bearing that expense.

18 **c. Failing to properly advertise the brand and services and requiring**
19 **Plaintiffs to waste money on ineffectual advertising**

20 This claim refers to Dux failing to provide effective advertising and continuing to place
21 ineffective advertising in the face of complaints regarding the same.

22
23 **d. Failing to provide Plaintiffs like prices, discounts, and incentives**
24 **offered to others similarly situated**

25 This claim is self explanatory.

26 **e. Diverting plaintiffs customer orders to themselves and other more**
27 **favorable franchisees**

28 This claim refers to Dux selling goods directly to a customer of plaintiffs in breach of the

1 agreement.

2 **f. Raising prices without the required thirty-day notice**

3 This claim refers to Dux raising prices to Plaintiff in violation of section 5.2 of the
4 agreement. See Letter Gustafsson Dec., Ex. B, page 48 of 48.

5 **g. Interfering with relations Plaintiffs' employees**

6 This claim refers to Defendants sending termination notices by fax to the Plaintiffs store
7 location with full knowledge that Ms. Johnson is not on the premises full time and with certainty
8 that her employees would see such notices. Such notices were sent with the intention to disrupt
9 those employment relations by causing the employees to fear their employment was in jeopardy
10 and causing them to begin looking for new employment.
11

12 **C. The Plaintiffs Have Stated a Claim for Unfair Competition**

13 This claim arises out of Dux's alleged failure to provide like discounts and incentives to
14 all dealers. Paragraph 34 of the complaint provides:
15

16 Dux's failure to provide Plaintiffs like prices, discounts, and
17 incentives offered to others similarly situated also constitutes
18 common law unfair competition as well as violates the federal and
19 state antitrust law entitling Plaintiffs to treble damages for such
20 conduct.

21 This claim implicates California Business and Professions Code Section 17045 which
22 provides:

23 The secret payment or allowance of rebates, refunds, commissions,
24 or unearned discounts, whether in the form of money or otherwise,
25 or secretly extending to certain purchasers special services or
26 privileges not extended to all purchasers purchasing upon like terms
27 and conditions, to the injury of a competitor and where such
28 payment or allowance tends to destroy competition, is unlawful.

26 In *ABC International Traders, Inc. v. Matsushita Electric Corp.*, 14 Cal.4th 1247, 61
27 Cal.Rptr.2d 112, 115 (1997), the California Supreme Court approved of such secondary line price
28 discrimination cases. The federal corollary is the Robinson-Patman Act (15 U.S.C. § 13 (a)) that

1 prohibits sellers from discriminating in price between at least two purchasers of goods of like
2 grade and quality where the effect may be to substantially lessen competition. To establish such a
3 violation, Plaintiffs must be able to show that (1) the sales were made in interstate commerce; (2)
4 the goods purchased were of like grade and quality; (3) the Defendant discriminated in price
5 between the Plaintiffs and another purchaser; and (4) the effect of the discrimination may be to
6 injure, destroy, or prevent competition to the advantage of the favored purchaser. *Volvo Trucks N.*
7 *Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 126 S.Ct. 860, 870, 163 L.Ed.2d 663 (2006).

8 This complaint provides fair notice to Defendants of the claims regarding price
9 discrimination. Moreover, it is not always necessary to specify the precise nature of the claim
10 asserted as long as the *facts* alleged put defendant on notice thereof. In *Self Directed Placement*
11 *Corp. v. Control Data Corp.* 908 F.2d 462, 466 (9th Cir. 1990) the complaint alleged claims for
12 copyright infringement, violation of trade secrets and fraud, but not unfair competition. However,
13 the facts alleged supported recovery for unfair competition, and plaintiff referred to “unfair
14 competition” in its jurisdictional statement and prayer for relief. This was enough to put
15 defendant *on notice* of the unfair competition claim. Thus, the federal rules do not require a
16 plaintiff to identify the statute under which the claims seek relief.

17 The appendix to the Rules of Civil Procedure contains models that illustrate the short and
18 simple allegations that Fed.R.Civ.P. 8 (a) calls for. It is enough to name the plaintiff and the
19 defendant, state the nature of the grievance, and provide enough information that will let the
20 defendant investigate. A full narrative is unnecessary. See, e.g., *Swierkiewicz v. Sorema N.A.*, 534
21 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002).

22
23 **D. The Plaintiffs Have Stated a Claim for Injunctive Relief.**

24 Plaintiffs have not yet moved for injunctive relief because they have received assurances
25 that Dux will continue to supply Plaintiffs until March 19, 2008. Plaintiffs will move the court
26 for a preliminary injunction to be heard in February if the parties cannot resolve their differences.

27 It is true that an injunction is an equitable remedy but it must be pled and prayed for.
28 “The basis for injunctive relief (preliminary or permanent) in the federal courts has always been

1 irreparable injury and the inadequacy of legal remedies.” *Weinberger v. Romero-Barcelo* 456
 2 US 305, 312, 102 S.Ct. 1798, 1803 (1982) (emphasis and parentheses added); *Stanley v.*
 3 *University of So. Calif.* 13 F3d 1313, 1320 (9th Cir. 1994). Here, the Plaintiffs will establish both
 4 factors. The termination of the Plaintiffs’ contract under these circumstances constitutes
 5 irreparable harm. Federal courts have consistently held that irreparable harm is present where, as
 6 here, a plaintiff is denied the ability to market its sole product line pursuant to an exclusive
 7 distribution agreement.

8 We have found irreparable harm where a party is threatened with
 9 the loss of a business. In *Semmes Motors, Inc. v. Ford Motor Co.*,
 10 429 F.2d 1197 (2d Cir.1970), a father-and-son car dealership was
 11 threatened with termination of its franchise by the manufacturer.
 12 We affirmed a finding of irreparable injury on the grounds that
 13 termination of the franchise would “obliterate” the dealership and
 14 that the right to continue a business “is not measurable entirely in
 15 monetary terms.” *Id.* at 1205; *see also Roso-Lino Beverage*
Distribs., Inc. v. Coca-Cola Bottling Co., 749 F.2d 124, 125-26 (2d
 16 Cir.1984) (per curiam) (finding irreparable harm from loss of
 17 “ongoing business representing many years of effort and the
 18 livelihood of its husband and wife owners”). We have also found
 19 irreparable harm in the loss of a relatively unique product.....

20

21 We believe that the governing principle is as follows. Where the
 22 availability of a product is essential to the life of the business *or*
 23 increases business of the plaintiff beyond sales of that product-for
 24 example, by attracting customers who make purchases of other
 25 goods while buying the product in question-the damages caused by
 26 loss of the product will be far more difficult to quantify than where
 27 sales of one of many products is the sole loss. In such cases,
 28 injunctive relief is appropriate. T

Tom Doherty Associates, Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 37 -38 (2nd Cir. 1995)

24 **E. Sharyn Johnson Has Stated a Claim for Intentional Infliction of Emotional**
 25 **Distress.**

26 This claim arises out of Dux’s and Gustafsson’s conduct in trying to force Ms. Johnson to
 27 capitulate and sell her business and its wrongful and pretextual termination of the contract. Ms.
 28 Johnson relies on this business for income to support herself and for her retirement. Ms. Johnson
 is 62 years old. Paragraphs 16 and 17 of the complaint describe the harassment and intimidating

1 conduct designed to inflict emotional distress on Ms. Johnson. Paragraph 42 and 43 provide:

2 Gustafsson and other Dux employees have intentionally and/or
3 recklessly engaged in conduct toward the Ms. Johnson that is
4 extreme and outrageous, with intent to cause her emotional harm
5 and relinquish her franchise. Moreover, the wrongful a pretextual
6 termination was intended to and did cause emotional harm.

7 As a direct and proximate result of the Defendants' actions,
8 Johnson has suffered severe and unnecessary anxiety, mental
9 anguish and emotional distress, and in some instances such
10 emotional distress has manifested itself physically.

11 These facts state a claim for emotional distress. The California Supreme Court has
12 described the elements for the tort of Intentional Infliction of Emotional Distress as follows: (1)
13 extreme and outrageous conduct by the defendant with the intention of causing, or reckless
14 disregard of the probability of causing, emotional distress; (2) the plaintiffs suffering severe or
15 extreme emotional distress; and (3) actual and proximate causation of the emotional distress by
16 the defendant's outrageous conduct. *Fletcher v. Western National Life Ins. Co.*, 10 Cal.App.3d
17 376, 394 (1970); *Alcorn v. Anbro Engineering, Inc.*, 2 Cal.3d 493, 497-499 (1970). Moreover,
18 severe emotional distress "may consist of any highly unpleasant mental reactions such as fright,
19 grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry." *Fletcher v.*
20 *Western Nat. Life Ins. Co.*, 10 Cal.App.3d 376, 397 (1970).

21 The extreme and outrageous nature of a defendant's conduct is often determined by what
22 he or she did and what relation or position of actual or apparent power he or she abused to
23 damage plaintiff's interests. These positions or relationships may take many forms. Intentional
24 abuse of a position of financial control over a plaintiff may also qualify as extreme and
25 outrageous conduct. See *Wallis v. Superior Court*, 160 Cal App 3d 1109, 207 Cal Rptr 123 (1984)
26 (laid off employee sued for intentional infliction of emotional distress alleging that the
27 termination of previously promised monthly payments constituted outrageous behavior). And the
28 California Supreme Court has emphasized the significance of the plaintiff's employee status,
stating that a plaintiff's status as an employee should entitle him or her to a greater degree of
protection from insult and outrage than if he or she were a stranger to defendants. *Alcorn*, 2 Cal

3d 493. Here, given that the business contributes to Ms. Johnson’s livelihood, it is closely akin to the employment context, and there is no question that Dux and Gustafsson have the power to damage her interests. See also *Independent Ass’n of Mailbox Center Owners, Inc. v. Superior Court* 133 Cal.App.4th 396, 410, 34 Cal.Rptr.3d 659, 670 (2005)(“These franchise agreements also resemble employment agreements to the extent that the franchisees’ livelihoods are involved...”)

F. Plaintiffs’ Have Stated a Section 17200 Claim.

In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999), the court held that § 17200 “does not proscribe specific practices. Rather, as relevant here, it defines ‘unfair competition’ to include ‘any unlawful, unfair or fraudulent business act or practice.’ ... Its coverage is ‘sweeping, embracing anything that can properly be called a business practice and that at the same time is forbidden by law.’ ” *Id.* at 180, 83 Cal.Rptr.2d 548, 973 P.2d 527. The tort encompasses practices which offend established public policy or that are immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. *Podolsky v. First Healthcare Corp.*, 50 Cal.App.4th 632, 58 Cal.Rptr.2d 89 (1996).

Glenn K. Jackson Inc. v. Roe 273 F.3d 1192, 1203 (9th Cir. 2001).

Here, the plaintiffs allege that Defendants have scheme to terminate the contracts of plaintiffs and others to enrich themselves and their associates. Complaint ¶ 15, 50. The systematic breaching of contracts has been held to be an unfair business practice. *Orkin Exterminating Co., Inc. v. FTC* 849 F.2d 1354, 1367–1368 (11th Cir. 1988); *Allied Grape Growers v. Bronco Wine Co.*, 203 CA3d 432, 450–451, 249 CR 872, 883 (1988).

Some of the oldest “unfairness” decisions involve sellers’ refusals to live up to the terms of their contract. The Commission has often

challenged sellers for traditional breaches of contract: failure to fill orders, delivery of inferior merchandise, refusal to return goods taken for repair, or refusal to return promised deposits. Recent trade regulation rules have focused on similar issues. These action have attracted little controversy. Breach of contract has long been condemned as a matter of law, economics, and public policy.

Orkin, 849 F.2d at 1367.

FTC Act decisions have been held to be persuasive regarding unfair competition.

Accordingly, we believe we must devise a more precise test for determining what is unfair under the unfair competition law. To do so, we may turn for guidance to the jurisprudence arising under the “parallel” (*Barquis v. Merchants Collection Assn.*, *supra*, 7 Cal.3d at p. 110, 101 Cal.Rptr. 745, 496 P.2d 817) section 5 of the Federal Trade Commission Act (15 U.S.C. § 45(a)) (section 5). “In view of the similarity of language and obvious identity of purpose of the two statutes, decisions of the federal court on the subject are more than ordinarily persuasive.”

Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 185, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999).

G. The Plaintiffs Concede Their Claim for Conversion.

Plaintiffs concede dismissal of their conversion claim.

H. The Plaintiffs Concede Their Claim for Unjust Enrichment.

Plaintiffs concede that their technical claim for unjust enrichment is not available separate and apart from other claims for relief.

I. Even If Found To Be Deficient, Any Dismissal Should Be With Leave To Amend:

Even if the Court determines that the Complaint fails to adequately allege facts or elements of a particular claim, absent unusual circumstances, dismissal without leave to amend is improper unless it is clear that the Complaint could not be saved by any amendment. *Polich v.*

1 *Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991). “A court may dismiss a complaint only
2 if it is clear that no relief could be granted under any set of facts that could be proved consistent
3 with the allegations.” *Big Bear Lodging Ass’n v. Snow Summit, Inc.*, 182 F.3d 1096, 1101 (9th
4 Cir. 1999) *quoting Hishon v. King & Spalding*, 467 U.S. 69, 73, 81 (1984). “[L]eave to amend
5 should be granted unless the court determines that the allegation of other facts consistent with the
6 challenged pleading could not possibly cure the deficiency.” *Tercica, Inc. v. Insmmed Inc.*, 2006
7 U.S. Dist. LEXIS 41804 (N.D. Cal. 2006) *citing Schreiber Distrib. Co. v. Serv-Well Furniture*
8 *Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

9
10 **V. CONCLUSION**

11 Plaintiffs have invested their savings and some sixteen years time in the Dux franchise.
12 They believe they have been gravely harmed by Defendants’ actionable conduct and have
13 properly pled their claims for relief. Defendants’ motion to dismiss should be denied. But if the
14 Court is inclined to grant any of the requested relief, it should afford the Plaintiffs leave to amend
15 their claims to cure any deficiencies.

16
17 Dated: December 27, 2007

LAGARIAS & BOULTER, LLP

18 /s/ Robert S. Boulter

19 By: _____
20 Robert S. Boulter

EXHIBIT A

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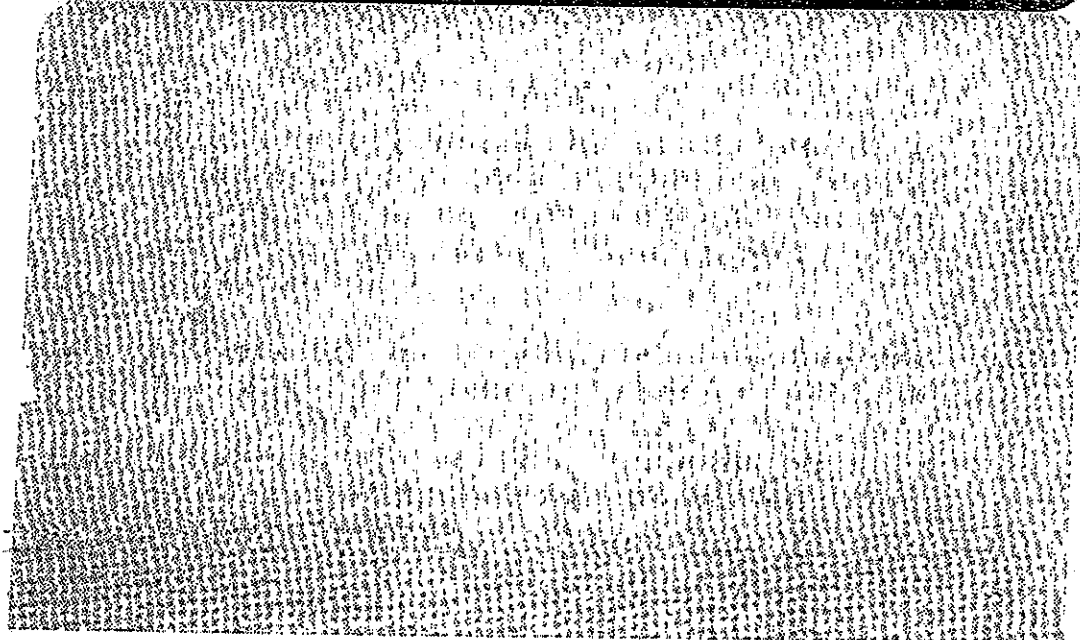
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President, DUX USA



(Received May 2005)